<u>Editor's note</u>: 101 I.D. 161

RIFE OIL PROPERTIES, INC.

IBLA 91-253 Decided December 30, 1994

Appeal from a decision of the Deputy State Director, New Mexico State Office, Bureau of Land Management, denying application to vent gas used to produce oil from the Jicarilla 126 No. 1 oil and gas well. NM SDR 91-03.

Reversed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Generally

   The exception from royalty for gas used on a lease in producing operations does not serve to automatically exempt gas used to lift and, thus, produce oil from a well, which gas is subsequently vented without authorization, without regard to whether marketing the gas would have been economic.

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Generally

   The regulations require an operator to market all oil and gas production if economically feasible and to conduct operations in a manner to prevent avoidable loss of oil and gas. In adjudicating an application to vent gas used to produce oil from a well when gas production was formerly sold into a pipeline until disconnected as uneconomic, the issue is whether the vented gas was unavoidably lost in that the expenditures necessary to market such gas were not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves.

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3. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Generally

A decision to deny an application to vent gas used in the production of oil from an oil and gas lease will be reversed where a preponderance of the evidence shows that the gas was unavoidably lost in that recovery of the gas was not economically feasible.

APPEARANCES: Karen Aubrey, Esq., and W. Thomas Kellahin, Esq., Santa Fe, New Mexico, for appellant; Gilbert O. Lockwood, Deputy State Director Mineral Resources, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Rife Oil Properties, Inc., appeals from a February 12, 1991, decision of the Deputy State Director Mineral Resources, Bureau of Land Management (BLM), Santa Fe, New Mexico, on State Director Review (SDR 91-03) denying Rife's application to vent gas filed pursuant to Notice to Lessees and Operators No. 4A (NTL-4A). The decision further declared that gas vented from the Jicarilla 126 No. 1 well situated in the SW¼ SW¼ of sec. 1, T. 24 N., R. 4 W., Rio Arriba County, New Mexico, was "avoidably lost" justifying an assessment of royalty.

An understanding of the issues in this case is aided by reference to the history of the well. A BLM memorandum in the case file dated May 4, 1989, discloses that this well was the Dakota discovery well in the West

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Lindrith Gallup-Dakota oil field. 1/ Following the initial completion of the well in March 1959, the well produced an average of 7.6 barrels of oil per day and 88 thousand cubic feet of gas per day (MCFPD) until 1966 (Statement of Reasons (SOR) at 10-11). All produced gas was sold into a gas-gathering system operated by El Paso Natural Gas Company (EPNG) until the well was disconnected from the pipeline on September 23, 1969. During the period from May 1966 through September 1969, gas production delivered into the pipeline averaged approximately 1.8 MCFPD (SOR at 11). On or about January 1, 1966, in an attempt to maintain production from the well, the operator installed an intermitter, described as a combination of a clock and an automatic valve which can be opened and closed periodically to flow the well at intermittent intervals. See Exh. X. 2/ Subsequently, by letters dated December 22, 1966, and January 23, 1967, EPNG gave notice to Brooks Hall (appellant's predecessor operator) that it planned to disconnect the well unless the negligible volumes of gas then being produced into the pipeline from the well were increased (Exhs. A and B).

Thereafter, by Notice of Disconnect dated October 7, 1969, EPNG notified the New Mexico Oil Conservation Commission (NMOCC) that it had disconnected the subject well from EPNG's system on September 23, 1969, because

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1/ The Gallup formation does not produce in this well. See Sundry Notice filed Oct. 20, 1960 ("Gallup zone abandoned").
2/ Appellant's SOR for appeal included several attached documents bearing exhibit numbers. One of those numbered exhibits is the affidavit of John D. Roe, Jr., a petroleum engineer employed by appellant's contractor, Dugan Production Corporation. Since 1982 Roe has been employed by Dugan as Engineering Manager. Dugan has "managed the well" and been the "contract pumper" for the well since January 1966 (Roe Affidavit at 5).

The Roe affidavit included several attached exhibits identified by letters of the alphabet. All exhibits referred to in this opinion are identified by their respective number or letter.

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the gas production was noncommercial (Exh. C). By Sundry Notice filed with Geological Survey (GS) 3/ on May 27, 1983, the operator indicated that the well was being produced with an intermitter, the well was shut in 21 hours each day to allow pressure to build up sufficiently to lift oil to the surface, and the gas used to produce the oil was being vented (Exh. E). The intermitter was used to continue producing oil from the well until it was shut in during April 1988 pursuant to BLM's Notice to Shut Down Operation dated April 11, 1988 (Exh. D; SOR at 5; Roe Affidavit at 10). The well is still shut-in at this time.

Prior to shut down of well operations, BLM confirmed with Rife by letter dated April 6, 1988, that it required a test of gas flow from the well in the form of a daily 3-hour test commencing April 1 (Exh. I). It appears from the record that the well was tested by BLM over the period from March 1 through April 8, 1988, by flowing the well for a brief but variable period of time (always less than 2 hours) on many of the days over
that span and measuring the production. See Handwritten report of Ed Wyatt (filed with Farmington Area Office, BLM, on Sept. 13, 1989).

Subsequent to the testing, BLM advised Rife by letter of May 16, 1989, that it had no record of approving an application to vent gas for

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3/ Responsibility for regulation of oil and gas operations on onshore leases was subsequently transferred within the Department of the Interior from GS to BLM. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982); Secretarial Order No. 3087, 48 FR 8983 (Mar. 3, 1983). Responsibility for collection of royalties on oil and gas leases was transferred from GS to the Minerals Management Service (MMS). Id.

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this well. Rife was further advised that an application for retroactive approval could be filed pursuant to NTL-4A addressing the economics of capturing the gas over the time from April 1, 1980, 4/ to the date the application is filed. Application for approval of venting the gas in support of production of oil from the well was filed with BLM by Dugan as agent for Rife on July 17, 1989.

The application included a graph of the production history of the well reflecting a rate of decline of about 17 percent through the first
8-1/2 years of production through 1967 at which time the rate leveled off at 3 percent (Application Letter of July 17, 1989, at 3 and Attachment 4). With respect to the economics of marketing gas produced from the well, the application asserts that the pipeline pressure in the area ranges between 175 and 250 pounds per sqare inch (psi), three to six times higher than the wellhead pressure required to produce with the intermitter (Application at 5). Appellant contends the well will not produce against this pipeline pressure. Id. The application states that in order to sell produced gas, it will be necessary to install rod pumping equipment. Cost data is provided to support the assertion that the expense of producing in this manner would exceed the return from sale of oil and gas, both in 1980 and at the time of the application (Application at 7 and Attachments 6 and 7).

4/ Although the effective date of NTL-4A was Jan. 1, 1980, a period of 90 days was allowed for filing an application for approval of venting for a well completed prior to the effective date of NTL-4A. 44 FR 76600-01 (Dec. 27, 1979).

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By decision dated November 30, 1989, BLM rejected the Rife application on the ground that, after evaluating the application, BLM had conducted its own analysis and concluded that it was economic to sell gas which had been vented, both in 1980 and at the present. The analysis apparently relied upon is found in the handwritten Wyatt report. This analysis was based on the gas production reported by the operator from 1959 through 1969 and gas/ oil ratio (GOR) test results reported for the years 1970-1971, 1983-1987, and 1988. 5/ See Wyatt Report at 2-3. This data was used to project estimated gas production based on the number of barrels of oil produced for the period from April 1, 1980, to 1988 when the well was shut in. See Wyatt Report at 6-7. The report analyzed the economics of capturing gas vented from April 1, 1980, through the 1988 shut-in of the well by comparing the costs with projected revenues if the gas had been sold. Two scenarios were studied, one using only the intermitter and another which included costs of installing pumping equipment. See Wyatt Report at 9. The net returns were calculated on a spread sheet. For recovery using pumping equipment, the calculated return discounted to 1980 value reflects a loss for the first 3 years of production and a total discounted profit for operations through the 1988 shut-in date of $17,020. See Wyatt Report, spread sheet B. Thus, the report concluded that even if a pumping unit were required to market the gas, it would have been economic to do so beginning in 1980. See Wyatt Report at introductory notes. Having found that sale of the vented gas

5/ Over the period from 1972 through 1982, the volume of gas from the well was reported by the operator as too small to measure. The Wyatt report rejected this estimate in view of the number of barrels of oil produced over the interval and endeavored to estimate the volume of gas produced and vented.

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would have been economic, the BLM decision further held that royalty would be assessed by MMS on the vented gas.

Rife sought review of this decision, reasserting that sale of gas from the well was uneconomic. Specifically, Rife asserted that:

> [T]he productivity of the well (a function of reservoir pay development) will not permit the shut-in pressure to build up much more than 250 to 300 psi following 21 to 22 hours of shut- in. This is not sufficient pressure to efficiently produce the well against a pipeline back pressure of 150-250 psi.

(Letter of Dec. 28, 1989, at 3). Further, Rife noted that "pipeline companies view wells of this nature as creating an operational problem for them" and have taken such measures as installing pipeline baffles to minimize the surging that occurs within their lines and metering facilities." Id. Rife related that these measures act as a back pressure regulator and reduce the efficiency of an intermitter or plunger lift system. Acknowledging that certain offset wells to the Jicarilla 126 No. 1 well do produce with an intermitter or plunger and do sell gas into the EPNG pipeline (as did Rife well until September 1969), Rife points out that these wells have not declined in productivity to the extent of the Jicarilla 126 No. 1 well which has produced for many more years. Thus, Rife states that four of the five closest offset wells (located within a radius of 3,100 feet) have been completed since 1978; the one well with a similar producing life, the Jicarilla 126-S No. 15, has not produced significant volumes since June

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of 1983; and the latter well was proposed for abandonment in the Gallup-Dakota formations under Sundry Notice filed in January 1989. See Letter of December 28, 1989, at 3-4 and Attachment C. 6/ Further, Rife pointed out that during 1987-1988, production from the four immediate offset wells (two produced by rod pump and two by intermitter and/or piston) averaged oil rates 3 to 12 times higher than actual or potential production from the Jicarilla 126 No. 1 well and gas rates were 2 to 6 times higher. See Letter of December 28, 1989, at 4 and Attachment C.

In a decision by the BLM State Director (SDR 90-4) dated January 30, 1990, the decision of the Farmington Resource Area Office, BLM, denying Rife's application to vent gas was remanded for a determination of the economics of producing the gas using a gas compression system at the well or, alternatively, the feasibility of producing the well into the pipeline using a plunger lift system. The decision cited a BLM analysis in the file indicating that "it would be economic to utilize a plunger lift system at the well which would produce gas intermittently at pressures sufficient to conduct sales against the pipeline pressure" (SDR 90-4 at 2). 7/ Noting

6/ While attachment C does not appear with the original letter of July 1989 in the BLM district office case file, a photocopy of the exhibit is included as an attachment with a photocopy of the letter of Dec. 28, 1989, that appears in the SDR file.
7/ Although the decision does not specify the report relied upon, the decision apparently refers to the Dec. 15, 1989, "Engineering Report" prepared by Ken Howell of BLM. The report concluded on the basis of tests conducted in March 1988 that flowing tubing pressure appears sufficient to produce into a 200 psi pipeline (Engineering Report at 2). Although the supporting calculations do not appear as an attachment with the case file copy, the report concludes regarding gas sales commencing in 1980 that, at a "12% discount rate, the cost of installing a plunger system and selling gas would pay out in less [than] 2 years." Id.

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Dugan's contention that pipeline surges might cause delivery problems, the remand directed evaluation of the "deleterious effects that the plunger lift system may have on the produceability of the well into the pipeline." Id.

Dugan responded to the remand on behalf of Rife in a letter to BLM dated February 16, 1990. Based on its experience with low volume wells, Dugan reiterated its belief that this well will not produce into the pipeline with a plunger lift system but would require a rod pump which would not be economic. Further, Dugan explained that,

when the gas consumed to operate the required rod pump is subtracted from production, the total production is less than the pipeline's minimum acceptable volume beneath which the pipeline is authorized to disconnect the well. Dugan also expressed strong disagreement with BLM estimates of the volume of gas vented since April 1, 1980, noting that BLM volume estimates have not been produced from the well since 1967 before the well was disconnected from the pipeline (Letter of Feb. 16, 1990, at 6 and Attachment C). This is asserted to be unrealistic in view of the actual production performance of this well and the fact that oil was produced over the interval from 1967 to 1980. In addition, Rife superimposed the production rates projected by BLM on the graph developed from the actual production history of the well showing that the projections were inconsistent with that history (Letter of Feb. 16, 1990, at 6 and Attachment 3).

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Further analysis was undertaken by BLM in response to the remand. In again reviewing the economics of marketing gas from the well, BLM considered criteria set forth in the GS Conservation Division Manual (CDM). Specifically, BLM found that installing a pump and compressor in 1980 does not meet the requirements of the CDM in that the combined net income from oil and gas operations does not provide a payout within 6 months and the payout from gas operations alone takes more than 5 years (Supplemental Engineering Report (undated) at 1; see GS, CDM, § 655.5.3F, Exh. 2 at 1-2. Further, in considering use of a plunger lift system, BLM reported that although the economics using a discounted cash-flow analysis are positive, they do not meet the CDM criteria regarding length of time until payout. Nonetheless, the report concluded that the guidelines should be disregarded in view of the positive discounted cash-flow analysis.

The record also contains a brief analysis dated June 14, 1990, by a BLM petroleum engineer indicating that, based on gas oil ratios from yearly tests since 1980, the energy value of gas measured exceeds the energy value of oil measured. Accordingly, the engineer concluded that the well qualified as a gas well under the definition in NTL-4A. Subsequently, the BLM Area Manager, Farmington Resource Area, issued a decision dated September 28, 1990, readjudicating the application for permission to vent gas. The decision found that the energy equivalent of the gas produced has always far exceeded the energy equivalent of the oil produced and therefore, under the terms of NTL-4A, the well has always been defined as a gas well. Further, the decision held that NTL-4A makes no provision for

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approval of venting of gas produced from a gas well subject to certain exceptions not relevant in this case. Hence, the Area Manager concluded: "[T]he gas vented from this well from April 1, 1980 (the effective date of NTL-4A) through the present must be classified as avoidably lost."

The Deputy State Director sustained the September 28, 1990, Farmington Resource Area decision on February 12, 1991 (SDR 91-03), on the ground that BLM properly determined the well to be a gas well as distinguished from an oil well and that venting of gas is not permitted from a gas well. Essentially BLM determined that inquiry into the economics of marketing gas from the well was only relevant in the case of venting of an oil well as venting of gas wells is prohibited save the narrow exceptions identified in NTL-4A for which Rife did not qualify (Deputy State Director Decision at 2-3).

Appellant contends in its SOR for appeal that the issue posed by BLM's rejection of the application to vent gas is whether royalty may be assessed on gas used in producing operations when the gas is used in connection with an intermitter. Rife contends that assessment of royalty on gas used in producing operations is contrary to the express terms of the lease contract which must control over any inconsistent regulatory provisions. Appellant notes that NTL-4A provides that no royalty shall accrue on gas produced from a lease which is used for operating or producing purposes. Rife disputes the authority of BLM to reclassify this oil well as a gas well and, on that basis, to assess royalty on the ground that all gas vented from a

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gas well is avoidably lost. Rife also contends that relevant statutes and regulations require payment of royalty on production "removed or sold" from the lease which has been construed in court cases involving both onshore and offshore production to exclude royalty on gas used in on-lease production activities, vented, or flared. Further, appellant argues that the waste resulting from premature plugging of this well because of BLM's prohibition of use of gas for purposes of production is contrary to statutory intent. Rife asserts that the prudent operator should provide the guiding principal in this case and that use of the gas with an intermitter to produce oil is the only economic means of operating the well. Additionally, appellant contends that BLM reclassification of the well as a gas well in a manner inconsistent with the NMOCC's well-spacing determination (which necessarily entails a gas versus oil classification) will generate problems which should be avoided in the absence of a congressional intent to preempt State regulation.

In its answer, BLM asserts that the intermitter is a simple valve operated by a timing mechanism and, hence, does not "use" gas. BLM argues that gas vented from the lease does not qualify as lease-use gas. Further, BLM contends that this is a gas well under the terms of NTL-4A because the energy equivalent of the gas produced exceeds the energy equivalent of the oil produced and venting of gas from a gas well is not authorized. Prevention of the waste of the more valuable natural resource is asserted to be the intent of NTL-4A. Additionally, BLM argues that sale of gas would have been profitable using the plunger lift system.

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As a threshold matter, we note that certain procedural questions have been raised by the briefs and pleadings filed in this case. Counsel for appellant has filed a motion to strike the supplemental answer to appellant's reply brief filed by BLM. Appellant asserts that it has the right to both open and close the briefing in this appeal since it bears the burden of proof. Further, appellant has moved for imposition of sanctions including attorney's fees and costs against BLM for misstating the facts in the BLM brief.

In considering appellant's request, it is noted that the regulations governing appeal procedures before the Board provide a timeframe for filing an SOR in support of an appeal (30 days subject to extension). 43 CFR 4.412(a); 43 CFR 4.22(f). Further, an adverse party is entitled to 30 days (subject to extension) from service of the notice of appeal or SOR in which to file an answer. 43 CFR 4.414; 43 CFR 4.22(f).

The regulations governing appeals before the Board are silent regarding the right to file a reply brief in response to an answer to appellant's SOR. In the exercise of its discretion, this Board has on occasion granted leave to file a reply brief where it appears that such a brief might be of substantial assistance in resolving the issues before the Board and the interests of the public, and the parties would not be prejudiced by any consequent delay. In the present case, in the interest of a full development of the issues before the Board, we have accepted and have reviewed appellant's reply brief, the supplemental answer of BLM, and appellant's

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subsequent reply brief accompanying the motion to strike. Accordingly, the motion to strike the BLM brief is denied. As appellant has shown no authority for granting sanctions including attorney's fees and costs against BLM based on asserted errors in its brief, the motion for sanctions is also denied. 8/

A motion to remand this case for reconsideration in light of the Board's decision in Mobil Exploration & Producing U.S., Inc., 119 IBLA 76, 98 I.D. 207 (1991), and BLM Instruction Memorandum No. 92-91 has been filed by BLM. Appellant opposes the remand request, arguing that the Mobil case does not require a remand. Appellant notes that the key issue before the Board is whether the gas involved was avoidably lost rather than the amount to be assessed (i.e., full value of the gas or royalty value), which was the issue in Mobil. Appellant contends that remand will result only in further delay in resolving the key issue in this appeal. We find that appellant's objection is well taken and deny the motion for remand.

In dealing with the substantive questions of this appeal, we find that two major issues are raised by this case. The first question is whether gas used to provide pressure to produce oil by lifting it to the surface constitutes gas used in production for which no royalty is due. Specifically, this case raises the question whether the exception for lease-use

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8/ Adjudication of any request for attorney's fees in this case is governed by our prior ruling on a similar petition filed by appellant in an earlier stage of these proceedings, cited as Rife Oil Properties, Inc., 116 IBLA 18 (1990). Thus, the request for attorney's fees
is denied.

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gas applies to gas which is vented and not consumed. The second issue is whether it was economic to produce the gas that was vented in operation of the intermitter.

[1] Appellant's oil and gas lease obligates the lessee to pay a royalty of 12-1/2 percent of the value or amount of all oil and gas "produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free" (Exh. 1 at 2). While not identical, this language is very similar to the terms production "removed or sold" from the lease on which royalty is due pursuant to section 17 of the Mineral Leasing Act (MLA), as amended by Act of August 8, 1946, ch. 916. § 3, 60 Stat. 950, 951 (codified at 30 U.S.C. § 226 (1988)). Several court cases interpreting the words "produced and sold" or similar terms as applied to the royalty obligation on oil and gas production held that Congress intended to ensure that royalty would be paid only on oil and gas removed from the leasehold and not on oil and gas used for production purposes on the leasehold where they were initially produced. Gulf Oil Corp. v. Andrus, 460 F. Supp. 15, 17 (C.D. Cal. 1978) (onshore oil and gas production under section 17 of MLA); 9/ see Amoco Production Co. v. Andrus, 527 F. Supp. 790 (E.D. La. 1981) (interpreting "production saved, removed, or sold" under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (1988); Marathon Oil Co.

9/ In the Gulf case the court invalidated NTL-4, a notice in which the Department for the first time required payment of royalty on all production including that used on the lease for production purposes.

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v. Andrus, 452 F. Supp. 548 (D. Wyo. 1978) (onshore oil and gas production); Petro-Lewis Corp., 108 IBLA 20, 28-32, 96 I.D. 127, 131-133, (1989). Thus, under these cases, gas which is consumed on the lease in the process of producing leased hydrocarbon substances would not be subject to royalty. 10/ However, this does not authorize the venting of produced gas simply because it was utilized to lift produced oil to the surface.

The provisions of NTL-4A were promulgated by the Department to rectify the problems with NTL-4 disclosed on judicial review. See 44 FR 76600 (Dec. 27, 1979) (introductory comments); Petro-Lewis Corp., 108 IBLA at 32, 96 I.D. at 133. It is recognized in NTL-4A that no royalty accrues on gas used on the lease for "beneficial" purposes. NTL-4A at Para. I, 44 FR at 76600. Beneficial purposes are defined to include gas used on the lease as "fuel" for operating or producing purposes or gas which is "consumed" in drilling, producing, or processing operations. NTL-4A at Para. II.B, 44 FR 76600. We find that the gas which is used to provide the lift for oil produced simultaneously therewith is not automatically exempt from royalty solely on the basis that it is lease-use gas when the gas is subsequently vented without regard to whether the gas could be economically produced.

[2] The venting or flaring of gas from oil wells may be approved pursuant to an application if it is shown that

10/ In the Gulf case, produced oil was used as fuel to power steam injection equipment in order to promote production. 460 F. Supp. at 16.

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> the expenditures necessary to market or beneficially use such gas are not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted * * *.

NTL-4A at Para. IV.B, 44 FR 76601. Further, "unavoidably lost" production is defined to include gas which is lost except where it is found that the lessee/operator failed to "take all reasonable measures to prevent and/or control the loss." NTL-4A at Para. II.C, 44 FR at 76601. Despite the remand on the question of economics of marketing the vented gas from this well which had been previously disconnected from the gas pipeline as uneconomic, the BLM decision under appeal as well as the decision it affirmed found this issue irrelevant because the well qualified as a gas well and venting of gas from a gas well is only permitted during very limited circumstances involving emergencies and well testing operations. See NTL-4A at Para. III, 44 FR at 76601. 11/

The relevant regulations provide that the operator shall put into marketable condition "if economically feasible" all oil, gas, and other hydrocarbon substances produced from the lease. 43 CFR 3162.7-1(a). Further, the operator is required to conduct operations in such a manner as to prevent "avoidable loss of oil and gas." 43 CFR 3162.7-1(d). The Board has upheld provisions of NTL-4A to the extent they "require the lessee to market oil and gas produced from the lease if economically feasible and to

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11/ A gas well is defined for purposes of NTL-4A as a well from which the energy equivalent of the gas produced exceeds the energy equivalent of the oil produced. NTL-4A at Para. IV.A, 44 FR 76601.

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conduct operations in such a manner as to prevent avoidable loss of oil and gas." Ladd Petroleum Corp., 107 IBLA 5, 7 (1989); see Mallon Oil Co., 107 IBLA 150, 156 (1989) (economically recoverable oil and gas may not be vented or flared without approval); Maxus Exploration Co., 122 IBLA 190, 198 n.1 (1992) (ultimate issue is whether economic reasons required venting of gas beyond generally allowed limits imposed by BLM). The classification of a well as an oil well or a gas well is not necessarily useful in making the determination whether recovery of the gas was economic. To the extent that BLM read NTL-4A as barring the venting of gas from a producing oil well without regard to whether it was avoidably lost, i.e., whether it was economic to market the gas, we find that BLM misread NTL-4A. 12/ Any doubt as to this was resolved by publication of Instruction Memorandum No. 87-652. See Ladd Petroleum Corp., supra at 8.

[3] Thus, the ultimate issue in this case is whether it would have been economic to market the gas from the well at issue over the interval from April 1, 1980, to the time the well was shut in by order of BLM. On an evidentiary question such as this, the relevant inquiry is whether the record supports a finding on the preponderance of the evidence that it would have been economic to market gas from the well. See Bender v. Clark, 744 F. 2d 1424 (10th Cir. 1984); Eason v. BLM, 127 IBLA 259 (1993). The Wyatt analysis on which BLM initially relied contained certain explicit

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12/ Indeed, a contrary finding would lead to potential waste of oil where production of oil was marginally economic but production of gas was not economic and the requirement to market the gas caused a premature abandonment of the well.

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caveats. The report acknowledged that it was predicated on a "number of assumptions, which if erroneous, would affect the overall results" (Wyatt Report, introductory comments at unnumbered page 2). Specifically, the report warned the user to review the analysis "critically" by substituting actual data for projections and by "making more valid assumptions based on * * * operating conditions and practices in the area." Id. Further, the report noted that "other nearby wells completed for production in the same formation which are produced on an intermitter and by pumping unit could provide comparative data as to the GOR and the amount of gas used as fuel, particularly if completed about the same time" (Wyatt Report, introductory comments at unnumbered page 3).

In its letter of December 28, 1989, appealing the initial BLM decision, Rife addressed the assumptions to be drawn regarding the production capability of the Jicarilla 126 No. 1 well by comparison with the other wells producing from the field in the immediate area. As noted above, Rife pointed out that four of the five closest offset wells (located within a radius of 3,100 feet) have been completed since 1978; the one well with a similar producing life, the Jicarilla 126-S No. 15, has not produced significant volumes since June of 1983; and the latter well was proposed for abandonment in the Gallup-Dakota formations under Sundry Notice filed in January 1989. See Letter of December 28, 1989, at 3-4 and Attachment C. Further, Rife noted that during 1987-1988, production from the four immediate offset wells (two produced by rod pump and two by intermitter and/ or piston) averaged oil rates 3 to 12 times higher than actual or

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potential production from Jicarilla 126 No. 1 well and gas rates were 2 to 6 times higher. See Letter of December 28, 1989, at 4 and Attachment C.

On SDR, BLM did not respond to this data. Rather, BLM held that the economics of gas recovery using a plunger lift system had been established and remanded the matter for a finding regarding the economics of producing the gas with the aid of a compressor and/or the feasibility of producing gas into a pipeline using the plunger lift method.

Dugan responded to the remand on behalf of Rife in a letter to BLM dated February 16, 1990. Based on its experience with low-volume wells, Dugan reiterated its belief that this well will not produce into the pipeline with a plunger lift system but would require a rod pump which would not be economic. Further, Dugan explained that when the gas consumed to operate the required rod pump is subtracted from production, the total production is less than the pipeline's minimum acceptable volume beneath which the pipeline is authorized to disconnect the well. Dugan also expressed strong disagreement with BLM estimates of the volume of gas vented since April 1, 1980, noting that such volumes have not been produced from the well since 1967 before the well was disconnected from the pipeline (Letter of Feb. 16, 1990, at 6 and Attachment C). This is asserted to be unrealistic in view of the actual production performance of this well and the fact that oil was produced over the interval from

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1967 to 1980. Further, Rife explained that the BLM volume projections were inconsistent with the actual production history of the well. Rife has reiterated this position on appeal. Thus, Roe observes in his affidavit that the rate of decline for production from this well, graphed in Exhibit M, is "similar to the decline curves which I have observed in many other wells within the West Lindrith Gallup-Dakota Oil Pool from which the subject well produces" (Affidavit at 13).

The BLM decision on remand did not address Rife's evidence that production was substantially less than projected by BLM and that producing pressures would not permit delivery into the pipeline without installation of a rod pump which would make production uneconomic. Rather, the decision on remand and on subsequent SDR relied upon a finding that this well was a gas well under the terms of NTL-4A and, hence, venting of gas was prohibited. Upon review of the extensive record in this case, we find that appellant has shown by a preponderance of the evidence that it was not economic to produce gas from the well either in 1980 or at the time the application was filed. 13/ Accordingly, the decision denying the application to vent gas and authorizing assessment of royalty is reversed.

13/ Appellant requested an evidentiary hearing before an Administrative Law Judge in this case. A hearing may properly be ordered where the record discloses unresolved material issues of fact. Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); see 43 CFR 4.415. In the present case, however, we find that the necessary evidence is in the record and we are in a position to resolve the legal issues and decide this case on the record. Hence, the request for a hearing is denied.

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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge